



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF DENIED: November 13, 2007

CBCA 678

INTERIMAGE, INC.,

Appellant,

v.

SMALL BUSINESS ADMINISTRATION,

Respondent.

Richard J. Webber of Arent Fox LLP, Washington, DC, counsel for Appellant.

Kenneth W. Dodds, Office of General Counsel, Small Business Administration, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **VERGILIO**, and **McCANN**.

McCANN, Board Judge.

Appellant, InterImage Inc., and respondent, the Small Business Administration (SBA), have cross-moved for summary relief. Appellant alleges that the contract is a fixed price contract and that it is entitled to be paid the full price of the contract. Respondent alleges that the contract is a time and materials contract and that appellant is only entitled to be paid for work performed plus travel expenses.

Findings of Fact

1. In February 2005, the SBA issued a statement of work (SOW) seeking proposals from GSA Multiple Award Schedule (MAS) contractors. This SOW was in support of the Office of Disaster Assistance's (ODA) organizational transformation initiative, in conjunction with the SBA's implementation of the Disaster Credit Management System (DCMS). Appeal File, Exhibit 1.

2. The SOW was the solicitation for the procurement. Section 3.0, "Technical Requirements and Deliverables," of the SOW identified five tasks and associated deliverables: (1) project management support, (2) transformation planning and implementation support, (3) reengineering business processes, (4) designing and developing web-based tools and providing implementation support, and (5) strategic planning support. *Id.*

3. The SOW provided: "Invoices shall be supported with a full breakout of costs and backup data, including period of Performance, Labor Categories/Hours and Other Direct Cost supporting documentation." It also provided:

All travel will be in accordance with the Federal Joint Travel Regulations and shall be performed on a reimbursable basis limited to applicable Federal Government per diem rates for the areas visited. Travel will be limited to the requirements associated with the task. The contractor shall provide receipts and other supporting documentation when invoicing travel.

Appeal File, Exhibit 1.

4. InterImage submitted its "Cost Proposal for Transformation Planning and Implementation" on February 17, 2005. The cost proposal stated as follows:

InterImage is pleased to offer to the SBA Office of Disaster Assistance the following cost proposal in response to the SBA ODA Transformation Planning and Implementation statement of work. InterImage estimates completing the proposed work in 5,664 hours or 708 days, during the base year period of performance. We estimate labor costs of \$914,082.40 and travel costs of \$35,498.00.¹ We agree to provide the proposed services for a firm fixed price of \$949,580.40.²

Task	Days	Costs
1. Provide Project Management Support	14	\$22,400.00
2. Provide Transformation and Implementation Support	244	\$390,400.00
3. Reengineer Business Processes	149	\$238,400.00
4. Design and Develop Web-based Tools and Provide Implementation Support ³	288	\$242,082.00
5. Provide Strategic Support	13	\$20,800.00
Total Labor	708	\$914,082.40
Travel Expense Estimate		\$35,498.00
Total Cost		\$949,580.40

¹ Travel estimate is based on GSA per diem rates in effect at this time and assumes that the various workshops for Transformation Planning Consultant Business Reengineering will rotate among ODA's operating locations in Buffalo, Atlanta, Fort Worth, Sacramento, and the DC-metro region and that no additional travel will be required.

² Cost is based on GSA Schedule Number GS-35F-5577H and GS-23F-8021H.

³ The proposal for Task 4: Design and Develop Web-based Tools and Provide Implementation Support includes labor hours associated with planning, managing, defining, designing, developing, testing and deploying the ODA web-based tool. The cost assumes that the development work will be done at the contractor's facilities. The contractor will provide any necessary development software and hardware required to host a development and test environment at the contractor's facilities. It will be the responsibility of ODA to purchase any software and/or hardware that may be needed to run and/or support the web-based tool in the ODA production environment. This may include but is not limited to any chosen COTS [commercial off-the-shelf] products, databases, and servers.

Appeal File, Exhibit 2.

5. Subsequently, on April 6, 2005, InterImage provided documentation, as requested by the SBA, to support the estimates in its proposal, showing a breakout of labor categories and discounted rates and its travel cost detail. Appeal File, Exhibits 3, 4. In this documentation Interimage stated:

As stated in our proposal, InterImage has designated Jon Kesler as our Program Manager/Senior Consultant. We have also designated Marsha Acker as the Technical Project

Manager/Senior Consultant and Moorosi Mokuena as the Business Reengineering Project Manager/Senior Consultant. Each will be billed at the Senior Consultant rate and we agree that they are available to perform the work as proposed. All proposed labor rates are based on BSA Schedule Number GS-23F-8021H with discounts applied.

Appeal File, Exhibit 4.

6. On April 18, 2005, the SBA issued order SBAHQ05F0209 under MAS contract GS23F8021H. Section 17 of that order, titled “Schedule,” states as follows:

ITEM NO. (a)	SUPPLIES OR SERVICES (b)	QUANTITY ORDERED (c)	UNIT (d)	UNIT PRICE (g)	AMOUNT (f)	QTY ACCEPT. (g)
0001	Consulting Services contract for the Office of Disaster Assistance Transformation Plan and Implementation. Period of Performance is April 15, 2005 through April 14, 2006 Price authority: InterImage, Inc. POC: Jon Kesler Date: 04/15/05 FAR Section 52.213-4 (d) (1)	1	LT	949,580.40	949,580.40	
					US\$ 949,580.40	17(h) TOTAL
					US\$ 949,580.40	17(i) GRAND TOTAL

Appeal File, Exhibit 7.

7. The period of performance in the order (April 15, 2005, through April 14, 2006) is different from the performance period in the proposal (March 1, 2005, through February 28, 2006). Appeal File, Exhibits 2, 7.

8. The meaning and significance of “Price authority: InterImage Inc.,” “Date: 4/15/05,” and “LT” is not explained in the record.

9. On April 15, 2005, the SBA also issued SBA order SBAHQ05F0209 under MAS contract GS35F5577H. Section 17 is identical to the order issued under MAS contract GS23F8021H, with the exception that no period of performance is specified.

10. Neither MAS schedule contract GS35F5577H nor MAS schedule contract GS23F8021H is included in the record.

11. On or about May 4, June 6, July 2, August 2, September 2, October 3, November 3, and December 2, 2005, and January 3, 2006, InterImage submitted invoices for work performed. All of these invoices were based on labor categories, rates, and hours worked as well as actual travel expenses. The total work invoiced and paid for from the commencement of work through December 31, 2005, was \$679,382.86. Answer ¶¶ 15-24.

12. The remaining amount on the contract was \$270,217.54. Beginning with its February 10, 2006, invoice, InterImage changed the format of its invoices and calculated the amount due based upon a percentage of completion. Appeal File, Exhibit 17.

13. The parties dispute the amount of work completed, regardless of the type of contract in place here.

Discussion

InterImage contends that the contract is a firm fixed price contract, that it fully performed the contract, and that it is entitled to be paid the remaining contract balance of \$270,217.54. The SBA, on the other hand, contends that the contract is a type of fixed hourly rate contract with reimbursement for travel, and that InterImage has received all payments that are due and owing under the contract.

We are guided by the well-established rules applicable to summary relief motions. Summary relief is only appropriate where there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Any doubt on whether summary relief is appropriate is to be resolved against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party shoulders the burden of proving that no question of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The non-moving party is required to point to “specific facts showing that there is a genuine issue for trial.” *Celotex*, 477 U.S. at 324. In considering summary relief, the judge will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249. All reasonable inferences and presumptions are resolved in favor of the non-moving party. *Id.* at 255; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

In this case the issue is certainly one of contract interpretation. The parties ask this Board to determine the type of contract underlying this dispute. The invoices and claim reference two purchase orders with the same purchase order number placed under two separate GSA MAS contracts. Neither of those MAS contracts is part of the record. Without the underlying contracts, and given the unexplained references on the purchase orders, the question of contract interpretation is not ripe for summary relief. Moreover, the distinctions between the two purchase orders and the two MAS contracts, if relevant, remain unexplained at this stage.

Furthermore, it is unclear whether the Board must review the actions of the parties prior to the dispute arising to determine their intent regarding the type of contract entered into here. It is well settled that the interpretation given to a contract prior to the dispute arising is demonstrative of the intention of the parties upon entering into the contract. *Jansen v. United States*, 344 F.2d 363, 369 (Ct. Cl. 1965). Certainly, at this point the Board cannot preclude the necessity for further fact finding regarding the actions of the parties prior to and after award. Under these circumstances, summary relief would be inappropriate.

Decision

_____The parties' motions for summary relief are **DENIED**.

R. ANTHONY McCANN
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

JOSEPH A. VERGILIO
Board Judge